

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THELEN REID & PRIEST LLP,

No C 06-2071 VRW

Plaintiff and  
Counterdefendant,

ORDER

v

FRANÇOIS MARLAND,

Defendant and  
Counterclaimant.

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Thelen Reid & Priest LLP ("Thelen") seeks to dismiss the counterclaims in François Marland's answer pursuant to Fed R Civ P 12(b)(1) and (b)(6). Doc #17. In the alternative, Thelen asks the court to stay all consideration of Marland's counterclaims pending a determination of the validity of the parties' December 2002 agreement. Id. For the reasons discussed below, Thelen's motion to dismiss and request for a stay are DENIED.

I

Thelen contends that Marland's counterclaims are not ripe and do not adequately state a claim for relief. Since both of these challenges to the counterclaims require the court to assume

1 their allegations to be true, the following is a summary of the  
2 facts as alleged in Marland's counterclaims.

3 Marland hired Thelen to provide advice on how to  
4 capitalize upon knowledge of a secret agreement used by Credit  
5 Lyonnais illegally to purchase insurance assets and junk bonds from  
6 the California Department of Insurance ("DOI"). Doc #14 at 26.  
7 Thelen helped Marland incorporate an entity called RoNo LLC to  
8 protect his anonymity through the process. Id. Thelen then  
9 attempted to negotiate an agreement with DOI to retain Marland as  
10 an expert witness for an investigation and lawsuit against Credit  
11 Lyonnais. Id. This unsuccessful negotiation prompted the DOI to  
12 conduct its own investigation, greatly reducing the potential value  
13 of Marland's information. Id.

14 Anticipating the DOI would file its own lawsuit, Thelen  
15 hurriedly counseled Marland to file a qui tam lawsuit through RoNo  
16 LLC. Id at 27. Thelen and Marland signed a recovery splitting  
17 agreement in February 1999. This agreement contained an  
18 arbitration provision. Id. The DOI filed its lawsuit on the same  
19 day that Thelen filed Marland's qui tam lawsuit. Id.

20 Thelen subsequently changed strategies and sought to be  
21 hired as the lead counsel in DOI's lawsuit, promising to split its  
22 contingency fee with Marland under the same formula that would have  
23 been used for the qui tam recovery. Id at 28. Thelen and Marland  
24 entered into a June 1999 agreement which memorialized the new fee  
25 splitting arrangement. Id at 29. In September 2001, the parties  
26 signed an amendment to both the February 1999 and June 1999  
27 agreements which reconciled the recovery arrangements to ensure  
28 that Marland would recover the same amount regardless which lawsuit

1 was ultimately successful. Id at 30. The September 2001 agreement  
2 also provided for a new counsel, selected by Thelen, to litigate  
3 RoNo LLC's qui tam action to prevent a conflict with Thelen's  
4 representation of the DOI. Id. Thelen, however, continued to  
5 serve as general counsel to RoNo LLC. Id.

6 Thelen always anticipated the litigation would involve  
7 "hundreds of witnesses on two continents, millions of pages of  
8 documents, complex regulatory issues and multiple criminal  
9 investigations and charges." Id. But Thelen began pressuring  
10 Marland to relinquish a greater share of the recovery to cover the  
11 costs of litigation shortly after signing the September 2001  
12 agreement. Id. In July 2002 Thelen gave notice that it was  
13 terminating the February 1999 agreement to represent Marland and  
14 told Marland that this would exclude Marland from any recovery of  
15 Thelen's contingency fees from representing DOI. Id at 31. Thelen  
16 further provided Marland with inaccurate information and legal  
17 counsel regarding settlement negotiations, retaliation threats  
18 against Marland and Marland's obligation to produce a document  
19 proving Credit Lyonnais secret agreement. Id at 31-32.

20 Marland signed an amended agreement in December 2002  
21 which reduced his recovery by one third and contained a global  
22 release of any claims, known or unknown, against Thelen. Id at 33.  
23 Marland alleges he was coerced into signing the agreement through  
24 intentional misrepresentations and inadequate representation of  
25 his interests by Thelen. Id at 32, 35-38, 41-42. Additionally,  
26 the December 2002 agreement was conditioned upon approval by the  
27 Commissioner of DOI, which was never obtained. Id 33. Marland  
28 seeks to enforce his rights pursuant to the arbitration clause in

1 the June 1999 agreement. Doc #13, Ex A.

2 Thelen seeks to have this court enjoin the arbitration  
3 proceedings and issue declaratory judgments that would invalidate  
4 Marland's claims. Doc #1. Marland responded by filing  
5 counterclaims asserting claims similar to those originally filed in  
6 the arbitration proceedings that Thelen seeks to enjoin. Doc #14,  
7 Ex A. These counterclaims include breach of fiduciary duty, breach  
8 of contract, bad faith denial of a contract, intentional  
9 misrepresentation, and negligence. Doc #14 at 35-43.

10 Marland explicitly conditions each of his counterclaims  
11 "in the event that Marland's second affirmative defense (failure to  
12 join an indispensable party) is dismissed and Marland's and RoNo's  
13 demand for arbitration is permanently stayed or dismissed for any  
14 reason." Doc #14 at 25. But Marland earlier asserts in the  
15 counterclaim that he is "prepared to litigate that issue in  
16 whichever forum (arbitration or court) is most appropriate and  
17 expeditious." Doc #14 at 24.

18 Thelen asks the court to dismiss these conditional  
19 counterclaims. Doc #17. The court discusses separately the  
20 motions to dismiss based on Fed R Civ P 12(b)(1) and (b)(6) below.

21 II

22 Thelen seeks to dismiss Marland's counterclaims pursuant  
23 to Fed R Civ P 12(b)(1) for lack of subject matter jurisdiction.  
24 Thelen alleges that the lack of subject matter jurisdiction appears  
25 on the face of Marland's counterclaims because the conditional  
26 nature of his counterclaims make them hypothetical and  
27 nonjusticiable. Doc #17. Specifically, Thelen argues that the  
28 counterclaims are not ripe for adjudication because they depend

1 upon the court's future determination of the validity of the  
2 December 2002 agreement.

3           The ripeness doctrine prevents premature adjudication of  
4 cases before the parties have a concrete interest in the outcome.  
5 The ripeness inquiry requires the court to consider both the  
6 fitness of the issues for judicial resolution and the hardship to  
7 parties of withholding judicial consideration. Abbott Laboratories  
8 v Gardner, 387 US 136, 148-49 (1967). In reviewing a facial  
9 challenge to a pleading, the court must consider the allegations of  
10 the counterclaims as true and in the light most favorable to the  
11 non-moving party. Gould Elecs, Inc v United States, 220 F3d 169,  
12 179 (3d Cir 2000). By that standard Marland's counterclaims are  
13 clearly fit for judicial resolution because they seek redress for  
14 well documented disputes in the past.

15           Claims which are contingent upon future action by the  
16 parties involved are considered unripe, preventing judicial  
17 consideration of a hypothetical controversy. Scott v Padadena  
18 Unified School District, 306 F3d 646, 662 (9th Cir 2002). The  
19 contingency of Marland's counterclaims upon the ability to  
20 arbitrate in another forum does not diminish the suitability of  
21 seeking redress for past torts and contract breaches in this forum.  
22 While Marland partially conditions seeking redress in this forum  
23 upon preliminary rulings by this court (Doc #14 at 25), his claims  
24 are not based on any future actions by the parties which may or may  
25 not occur. Marland's claims present a live case or controversy;  
26 they merely retain the possibility of litigating these disputes in  
27 another forum.

1           Additionally, the factual record concerning Marland's  
2 counterclaims is well settled. In fact, the counterclaims' factual  
3 basis overlaps significantly with the factual recitals of Thelen's  
4 complaint. The factual inquiry into which agreement controls the  
5 parties' rights and obligations pertains to both Thelen's attempt  
6 to stay arbitration and Marland's claims for damages in tort and  
7 contract law. Marland's counterclaims are as fit for judicial  
8 inquiry as Thelen's request for a declaratory judgment because they  
9 both involve the same well documented series of past agreements.

10           Thelen argues that Marland will not suffer any hardship  
11 from dismissal of his counterclaims because they will either be  
12 arbitrated if the December 2002 agreement is invalid or be barred  
13 by the mutual release provision if the December 2002 agreement is  
14 valid. As discussed earlier, the court must consider each  
15 allegation in the counterclaim as true for this facial challenge.  
16 Accepting the allegations of the counterclaim as true, the court  
17 finds the counterclaims are justiciable because they present a live  
18 case or controversy regardless of the December 2002 mutual release  
19 provision's validity.

20           First, Thelen argues that Marland's counterclaims are  
21 hypothetical because will not be litigated in this forum if the  
22 December 2002 agreement is found to be unenforceable. Earlier in  
23 the counterclaim, however, Marland states he "is prepared to  
24 litigate that issue in whichever forum (arbitration or court) is  
25 most appropriate and expeditious." Doc #14 at 24. Viewing all  
26 allegations in the light most favorable to the non-moving party in  
27 this facial challenge, the court presumes Marland will continue to  
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litigate his counterclaims in this court if it is most appropriate and expeditious.

Accordingly, dismissal would bring hardship to Marland by denying an opportunity to litigate his counterclaims in the forum of his choice.

### III

1 true and construe them in the light most favorable to the non-  
2 moving party. Cahill v Liberty Mutual Insurance, 80 F3d 336, 337-  
3 38 (9th Cir 1996). The motion will be denied if Marland can prove  
4 any set of facts which would support a counterclaim and entitle him  
5 to relief. Id.

6 Thelen argues that "Marland's counterclaims are self-  
7 canceling in nature and, therefore, fail to state a claim for which  
8 relief can be granted." Doc #26 at 3. This assumes that the  
9 counterclaims will either be withdrawn from this forum and  
10 arbitrated if the December 2002 agreement is invalid or if the  
11 December 2002 agreement is valid the claims are subject to the  
12 mutual release provision. But Marland conditions his counterclaims  
13 on more than just the inability to seek redress through arbitration  
14 proceedings. The counterclaims vest upon both the dismissal or  
15 permanent stay of arbitration and the dismissal of Marland's second  
16 affirmative defense which seeks to join RoNo LLC as an  
17 indispensable party. Doc #14 at 25. This indicates that Marland  
18 will continue to litigate if the court finds the December 2002  
19 agreement unenforceable but Marland is successful in joining RoNo  
20 LLC. Marland's counterclaims are not necessarily "self-cancelling"  
21 because there is a circumstance in which the counterclaim will be  
22 litigated and not barred by the mutual release provision of  
23 December 2002.

24 Additionally, Marland asserts that he "is prepared to  
25 litigate that issue in whichever forum (arbitration or court) is  
26 most appropriate and expeditious." Doc #14 at 24. This indicates  
27 the counterclaims are in fact conditional upon the dismissal or  
28 permanent stay of arbitration only if arbitration is still





1           Additionally, the parties will comply with the following  
2 schedule. Simultaneous letter briefs regarding the applicability  
3 of the Hague Convention will be filed on September 12, 2006. All  
4 phase one document discovery will be completed by October 13, 2006.  
5 All phase one depositions will be completed by February 2, 2007. A  
6 hearing for dispositive motions will be held on April 5, 2007, at  
7 2:00 PM and a case management conference will be held on May 15,  
8 2007, at 9:00 AM.

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10           SO ORDERED.

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13           VAUGHN R WALKER

14           United States District Chief Judge  
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